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No. 84-1376

In the Supreme Court of the United States

OCTOBER TERM, 1984

GRIM HOTEL COMPANY, ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether five corporations, all engaged in the hotel business and controlled by the same individual, are an "enterprise" within the meaning of Section 3(r) of the Fair Labor Standards Act, 29 U.S.C. 203(r).

2. Whether a corporate officer who exercises significant day-to-day control over the affairs of a business, including decisions over wages, is an "employer" within the meaning of Section 3(d) of the Fair Labor Standards Act, 29 U.S.C. 203(d).

3. Whether the district court properly exercised jurisdiction, under a state long-arm statute, over a non-resident corporate officer who was engaged in substantial in-state activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E1-E20) is reported at 747 F.2d 966. The district court's opinions (Pet. App. C1-C22 and D1-D4) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1984, and the petition for a writ of certiorari was filed on March 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Secretary of Labor brought suit against five hotels and their president, alleging that the hotels failed to pay the minimum wage and overtime compensation to their employees, as required by the Fair Labor Standards Act (FLSA). The district court rejected petitioners' arguments that the hotels are not an "enterprise"covered by the Act, that the

president is not an "employer" under the Act, and that the court lacked jurisdiction over the president. It held that petitioners had violated the Act (Pet. App. C1-C22, D1-D4). The court of appeals affirmed (Pet. App. E1-E20).

Petitioner Charles Alberding, a resident of Chicago, Illinois, is founder and president of the five petitioner corporations, each of which owns a hotel located in Texas (Pet. App. E7). The Secretary of Labor brought suit in the United States District Court for the Eastern District of Texas, under Sections 16(c) and 17 of the Act, 29 U.S.C. 216(c) and 217, to enjoin the hotels and Alberding from violating the minimum wage and overtime provisions of the FLSA and to obtain damages (Pet. App. E5-E6). The hotels admittedly failed to comply with the minimum wage and overtime provisions of the FLSA.[1]

Alberding moved to dismiss the complaint for lack of personal jurisdiction under the Texas long-arm statute, Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964). The court denied the motion in 1981. It found that Alberding was "clearly 'doing business' in Texas" for purposes of personal jurisdiction under the long-arm statute and that he had "purposefully availed himself of the benefits and protections of Texas law." Therefore, the court held that the exercise of "personal jurisdiction over him * * * does not offend the constitutional requirement of due process of law." Pet. App. D3-D4.

A trial on the issue of liability followed. The hotels argued that they are not an "enterprise" under Section 3(r) of FLSA, 29 U.S.C. 203(r). The Act applies to enterprises

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[1]The hotels paid employees working as desk clerks and maids anywhere from $1.30 to $2.30 per hour, significantly less than the minimum wage rate in effect. The hotels did not pay a premium for overtime work, so employees who worked over 40 hours per week did not receive one and one-half times their normal rate of pay as required by the Act. Pet. App. C1-C2, E6; 29 U.S.C. 206, 207.

with an annual gross volume of business of at least the amount specified in Section 3(s), 29 U.S.C. 203(s). The parties stipulated that each of the hotels, individually, had an annual gross of less than the jurisdictional amount but that, cumulatively, their annual gross exceeded that amount. Pet. App. E8. The district court held, in 1983, that the five hotels constituted an enterprise because they engaged in related activities (Pet. App. C9-C13), they shared a common business purpose (*id.* at C13-C15), and they were subject to centralized control (*id.* at C15-C17). The district court also held that Alberding was an "employer" under Section 3(d) of the FLSA, 29 U.S.C. 203(d), finding that he "exercised ultimate control" over the business activities of the hotels. Pet. App. C17-C20. The court held that petitioners had violated the Act willfully and were therefore liable for three years' back pay (*id.* at C20-C21). It enjoined future violations as well (*id.* at B1-B2).

The court of appeals affirmed (Pet. App. E1-E20). It found that the "hotels were centrally directed, connected, and interdependent" (*id.* at E11). The court noted that separate incorporation of the hotels did not exclude them from coverage under the FLSA. Because, in fact, they "operated as a single enterprise performing related activities through a common control," the court held that they were an enterprise under Section 3(r) of the FLSA, 29 U.S.C. 203(r) (Pet. App. E12).

On the issue of whether Alberding was an "employer" under the FLSA, the court of appeals found that he controlled the hotels and their purse-strings, guided their policies, personally selected their managers, and traveled to Texas to inspect them and resolve major problems. The court concluded that "the hotels, speaking pragmatically,

were Alberding's and functioned for the profit of his family." Pet. App. E13-E14.[2]

The court of appeals also rejected Alberding's contention that the district court erred in denying his motion to dismiss for lack of personal jurisdiction, noting that Alberding's personal presence in Texas and his personal acts in connection with the hotels "were not insubstantial" (Pet. App. 14-E16), so that exercise of jurisdiction over Alberding under the Texas long-arm statute comported with due process (id. at E17-E18).

ARGUMENT

The court of appeals correctly applied well-settled legal principles to the facts of this case. Its decision does not conflict with any decision of this Court or of another court of appeals. Petitioners' arguments that the hotels are not an "enterprise" and that Alberding is not an "employer" are based largely on their disagreement with the district court's factual findings, which the court of appeals concluded were correct, and do not warrant further review. Alberding's argument that the district court lacked jurisdiction over him is without merit.

1. Petitioners argue (Pet. 12-13) that the hotels are not an enterprise because they are not engaged in "related activities." Petitioners argue, primarily, that the hotels are not related because the ratio of long-term guests to short-term

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[2]The court noted (Pet. App. E7-E8 n.3) that it had, in a prior case, found Alberding to be an employer responsible for minimum wage and overtime pay violations of a Louisiana corporation that he controlled. *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d 190, 195 (5th Cir.), cert. denied, 463 U.S. 1207 (1983). In addition, the Tenth Circuit has found Alberding responsible for minimum wage and overtime pay violations at Oklahoma hotels that he controlled. *Marshall* v. *McAlester Corp.*, No. 78-1303 (Mar. 7, 1980) (unpublished), cert. denied, 449 U.S. 828 (1980).

guests differs among the hotels. As the court of appeals concluded (Pet. App. E9), this does not change the essential nature of the hotels' business. The court properly found that "businesses, calling themselves hotels and operating as hotels, whether their guests stay a short or long while, are engaged in related activities for the purpose of the Act" (Pet. App. E9). See *Donovan* v. *Janitorial Services, Inc.*, 672 F.2d 528, 529-530 (5th Cir. 1982); *Brennan* v. *Plaza Shoe Store, Inc.*, 522 F.2d 843, 847-848 (8th Cir. 1975). See also *Brennan* v. *Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1366-1367 (5th Cir. 1973).[3]

Contrary to petitioners' further contention (Pet. 13-14), the hotels were clearly "commonly controlled," since they "were centrally directed, connected, and interdependent" (Pet. App. E11). Petitioners argue with the court's factual conclusions in this regard by pointing to the separate incorporation of each of the hotels and the Alberding family's hypothetical control over the hotels by virtue of its stock ownership. But corporate fragmentation of the businesses that make up an enterprise does not exclude coverage under the FLSA. As the court of appeals concluded, the separate incorporation of each of the hotels and their stock ownership were a "formality" and in practice the hotels were "centrally controlled by and operated as a single group"

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[3]Contrary to petitioners' assertion (Pet. 12), there is no conflict between this case and *Hodgson* v. *University Club Towers, Inc.*, 466 F.2d 745 (10th Cir. Cir. 1972). The court in *Hodgson* held that the activities of a corporation engaged exclusively in the operation of a hotel and those of a corporation engaged exclusively in the operation of apartment houses were not "related" within the meaning of the FLSA (*id.* at 746). Here, in contrast, petitioners made no showing that the units at any of the hotels were under lease to permanent residents for extended periods. Furthermore, in *Hodgson*, there was a lack of other factors that would have led to a finding of enterprise coverage, such as employee interchange, common bookkeeping, and unified management — factors that are all present in this case.

(Pet. App. E11). See *Donovan* v. *Sideris*, 688 F.2d 74, 75-76 (8th Cir. 1982); *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d at 194-195; *Schultz* v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1299-1301 (5th Cir. 1969). In any event, this factual issue does not warrant the Court's attention.

2. Petitioners also assert (Pet. 6-8) that Alberding was not an "employer" within the meaning of 29 U.S.C. 203(d). Once again, petitioners' argument is based largely on their disagreement with the factual findings made by the district court and affirmed by the court of appeals.

In determining whether the evidence established that Alberding was an employer, the courts properly examined the "economic realities of employment." *Donovan* v. *Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983); *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d at 193. See also *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, No. 83-1935 (Apr. 23, 1985), slip op. 10; *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). An individual is deemed to be an "employer" under the FLSA when he has "substantial control of the terms and conditions of the work of * * * employees" (*Falk* v. *Brennan*, 414 U.S. 190, 195 (1973)). As the district court stated (Pet. App. C19, quoting *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d at 194-195), the definition of "employer" in the FLSA is "sufficiently broad to encompass an individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees." Here, Alberding controlled the hotels' purse-strings, guided their policies, chose their managers, and traveled to Texas to inspect them and solve their major problems. Only he could have authorized compliance with the minimum wage

and overtime compensation provisions of the FLSA.[4] The court of appeals concluded that it could not "imagine firmer proof of Alberding's 'employer' status" (Pet. App. E13 & n.7).

Contrary to petitioner's assertion (Pet. 6), the court did not apply a "strict liability" test for corporate officers for FLSA violations, nor is that the effect of the court's decision. Rather, the court fully examined Alberding's relationship to the hotels in accord with settled legal principles before concluding that he was an employer within the meaning of the FLSA. See *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d 190, 194-195 (5th Cir. 1983), aff'g 531 F. Supp. 923, 928-929 (W.D. La. 1981), cert. denied, 463 U.S. 1207 (1983).[5] Further review of these factual issues is clearly unwarranted.

3. As the court of appeals held (Pet. App. E14), petitioners' argument that the district court had no personal jurisdiction over Alberding "is patently without merit." There is no doubt that Alberding was doing business in Texas, as

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[4]The court of appeals noted (Pet. App. E13 n.7) that petitioners dispute the finding that Alberding controlled employees' wages, but concluded that the district court's finding, based on credited testimony regarding Alberding's ultimate control of major expenditures, was "far from clearly erroneous." The court of appeals also noted that, even if the district court erred in admitting the hearsay evidence that wage increases required Alberding's approval, the error was harmless (Pet. App. E7 n.2).

[5]*Donovan* v. *Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983), cited by petitioners to support their argument that the court improperly found Alberding to be an "employer," actually supports the decision of the court of appeals in this case. The court of appeals in *Agnew* found two corporate officers to be personally liable for FLSA violations where the officers "had operational control of significant aspects of the corporation's day to day functions, including compensation of employees" (712 F.2d at 1514). The similar factual findings in this case support the conclusion that Alberding is an "employer."

required by the Texas long-arm statute, Tex. Rev. Civ. Stat. Ann. art. 2031b § 4 (Vernon 1964). He hired the hotel managers, regularly traveled to Texas in connection with operation of the hotels, and made loans to the hotels (Pet. App. E15). Nor were these actions taken solely by Alberding in his corporate capacity, since he was an "employer" under the FLSA, personally had control of the terms and conditions of employment of Texas employees, and was personally present in Texas (Pet. App. E16). Contrary to petitioners' contention (Pet. 9), there is nothing "fundamentally unfair" about the court's assertion of jurisdiction over a corporate officer because of actions outside of the state that directly affect employees in the state where jurisdiction is asserted. See *Calder* v. *Jones*, No. 82-1401 (Mar. 20, 1984). See also *DeMelo* v. *Touche Marine, Inc.*, 711 F.2d 1260, 1272 (5th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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